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No. 89-919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SMITH MACHINERY COMPANY, INC.,
Petitioner,

v.

HESSTON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.1 LIST

The parent companies of respondent Hesston Corporation are wholly owned by MAIN (Merger, Acquisitions and Investments), Ltd., Nassau, Bahamas (MAIN) and Fiat Geotech S.p.A. Fiat S.p.A. is in turn the ultimate parent of MAIN and Fiat Geotech S.p.A. Hesston Credit Corporation is an affiliate of Hesston Corporation. Hesston Corporation has no non-wholly owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Hesston Corporation respectfully requests this Court to deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 878 F.2d 1290 and is set forth in Petitioner's Appendix A pp. 1A-33A. The memorandum decision of the District Court is reported at 1987-1 Trade Cases (CCH) ¶ 67,563 and is set forth in Petitioner's Appendix B pp. 34A-69A.

STATEMENT

The facts set forth in the opinions of the Tenth Circuit and the District Court are adopted by reference. The following statement further clarifies the Petitioner's Statement and identifies misstatements to the extent perceived by the Respondent to be material to the decision whether to grant Smith's petition for a writ of certiorari.

1. *The Parties.* Hesston Corporation (Hesston) is primarily engaged in developing, manufacturing, marketing and servicing farm machinery in the hay and forage lines. Hesston sells farm machinery throughout North America, as do all the major farm machinery manufacturers with which Hesston competed. Like most manufacturers in the farm machinery industry, Hesston sold farm machinery to independent dealers for resale to the public. Hesston's share of total industry sales throughout North America did not exceed 2.5% in any year since 1975.

The petitioner Smith Machinery Company (Smith) was an independent dealer for John Deere, Hesston and other product lines, located in Roswell, New Mexico. Smith engaged in the business of selling and servicing irrigation pump equipment and farm machinery. Smith's income from Hesston products was less than 20% of Smith's total business income even in Smith's best years for the sale of Hesston products. Since 1962, Smith's primary line of farm machinery was John Deere.

In 1980, Hesston began to introduce to its dealers a line of tractors intended to compete with farm tractors marketed by major farm equipment and tractor manufacturers such as John Deere and others who also market farm machinery throughout North America.

2. *The Alleged Tying Arrangement.* Smith alleged that Hesston offered to continue to sell certain Hesston products to Smith (windrowers, the "big baler" and parts), but only on the condition that Smith purchase

Hesston tractors. Smith never purchased, or agreed to purchase or offer for sale, any Hesston tractor. Smith alleged that Hesston unlawfully terminated Smith as a Hesston dealer because Smith refused to comply with Hesston's attempted tying arrangement.[1] No tying arrangement of any kind was alleged at the retail level. That is, no consumer was ever alleged to be subject to any kind of tying arrangement with regard to Hesston products.

Hesston moved for summary judgment, conceding for purposes of Hesston's motion for summary judgment only, that Smith's termination was based on Smith's refusal to carry the Hesston tractor.

The District Court concluded that the expenditure that would have been required of Smith (had Smith agreed to carry the Hesston tractor) was *de minimis* and "insufficient as a matter of law to foreclose purchases by Smith of competing tractors." (Petitioner's Appendix (Pet. App.) 59A) Due to various financing programs offered to Hesston dealers, the Hesston tractor was basically offered for sale at Hesston's expense, not the dealer's expense.

The dealer's out-of-pocket expense for carrying the Hesston tractor was limited to parts, tools, manuals, freight, one-time airfare to Wichita, Kansas and a minimal financing charge that typically would not exceed $12 per month even for the largest tractor. Thus, the District Court concluded that "[t]he only competent evidence before the Court on the initial set up cost [to Smith] of

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[1] Because of Smith's refusal to enter into the alleged unlawful agreement, no "agreement" between Smith and Hesston existed for purposes of the required agreement or contract under § 1 of the Sherman Act. The issue of whether Smith could satisfy the Sherman Act requirement of a contract, combination or conspiracy by Smith's assertion that Hesston terminated Smith to coerce other dealers outside the relevant geographic market alleged by Smith was never reached.

carrying the tractor states that the cost of carrying the tractors . . . would be approximately $3,600 plus the cost of a round trip ticket from Roswell to Wichita, Kansas for an employee to train in service and repair of tractors." (Pet. App. 59A) As to Smith's argument that the true cost of carrying the Hesston tractor was much greater, the District Court held that "Smith failed to raise a genuine issue of material fact." (Pet. App. 60A)

No competent evidence exists to support the assertion in Petitioner's Statement (p. 3) that "because up to 30 tractors annually were implicated by the tie at an average cost of $35,000 each, Hesston's tying arrangement with Smith represented foreclosure of free commerce in the annual amount of $1,000,000.00." Smith's Statement mischaracterizes the District Court's analysis of the maximum number of tractor sales that, based on Smith's conclusory assertions (not evidence), could "arguably" have been affected by the tying arrangement. (*See* Pet. App. 61A.) Smith's Statement is misleading because the District Court expressly held that the expenditures required of Smith were insufficient as a matter of law to foreclose Smith from purchasing competing tractors.

The assertions in Petitioner's Statement (p. 3) regarding the competitive advantages Hesston's alleged tying arrangement gave its tractors and the basis of the asserted advantages are mere argument (as are many of Smith's characterizations of the Tenth Circuit and District Court decisions) unsupported by the record or any findings or conclusions by the courts below.

Smith alleged that the Hesston "big baler" was the primary product that gave Hesston substantial market power to force Smith and other Hesston dealers to accept the Hesston tractor. Only 6 such balers were sold in New Mexico (4 of which were in the Pecos Valley) and only 110 were sold throughout North America in 1982, a typical year, and the last year that Smith was a Hesston dealer. The Hesston "big baler" accounted for only 4.5%

of all the hay balers sold in New Mexico, only a minor percentage of sales even in the Pecos Valley and only .45% of all of the hay balers sold in North America in 1982. Nevertheless, Smith claimed that the Hesston big baler was "uniquely popular" in the Pecos Valley of New Mexico and therefore constituted a single product market over which Hesston allegedly had complete control due to certain patented components of the baler.[2]

The "tied product" market alleged by Smith was farm tractors. Hesston's unit volume of retail tractor sales was less than 2% of the farm tractors sold in North America and less than 1% of the tractor sales in New Mexico.

Contrary to the suggestion in Petitioner's Statement (p. 4), no competent evidence existed that the 600 Hesston dealers in North America that carried the Hesston tractor did so because of any market power Hesston possessed. Like Smith, Hesston dealers typically carried another major non-Hesston "full line" of farm machinery.

3. *Smith's State Court Litigation.* Smith's second Question Presented assumes that the Tenth Circuit "failed to follow" *Smith Machinery Corp. v. Hesston, Inc.*, 102 N.M. 245, 253, 694 P.2d 501, 509 (1985) in which the New Mexico Supreme Court reversed the state court judgment dismissing Smith's state antitrust claim

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[2] The identity of the relevant product and geographic markets (as well as the reason for Smith's termination) were issues that would have been in dispute had Smith's case proceeded to trial. Although Smith's contentions in this regard were vague and inconsistent in certain respects, they were generally accepted by Hesston for purposes of Hesston's motion for summary judgment only. Hesston's evidence included extensive, detailed and widely accepted industry statistics relating to sales in Smith's alleged product markets at the North American, national, state and county levels as well as testimony in the record relating to local area sales.

and remanded the case for a full trial on the merits stating:

> We emphasize that our review of the relevant evidence is directed solely at the narrow issue presented and is not to be construed as a commentary on the ultimate merits of the antitrust claim.

According to the New Mexico Supreme Court, the "narrow issue presented" was whether Smith established a prima facie case of unlawful tying under the New Mexico Antitrust Act, N.M. Stat. Ann. § 57-1-1 to -19 (Cum. Supp. 1985) in Smith's case-in-chief at trial. The state district court had dismissed Smith's case at the close of Smith's case-in-chief at trial before Hesston presented any evidence. In *Smith Machinery*, the New Mexico Supreme Court decided, based exclusively on Smith's evidence, that Smith had presented a prima facie case of unlawful tying that was not subject to dismissal without hearing the defense.

After the New Mexico Supreme Court remanded the case to the state district court for a full trial, Smith amended its complaint in federal court to add the state antitrust claim as a pendent claim, and dismissed the state court action without prejudice. No final order or judgment was ever entered in the state court.

After the completion of discovery in the federal court action, Hesston moved for summary judgment. The District Court extensively analyzed Smith's arguments as to res judicata and law of the case in connection with the state court litigation, concluding, among other things, that its own decision "is not necessarily in conflict with the New Mexico Supreme Court decision," due to the limited record before the New Mexico Supreme Court in comparison with the extensive factual record in federal court resulting from discovery. (Pet. App. 48A-49A.) The District Court granted summary judgment dismissing Smith's

claims under the Sherman Act, § 1, 15 U.S.C. § 1 (1982), the Clayton Act, § 3, 15 U.S.C. § 14 (1982) and the New Mexico Antitrust Act, N.M. Stat. Ann. §§ 57-1-1 to -19 (Cum. Supp. 1985). The Tenth Circuit affirmed in the decision petitioner challenges here.[3]

Regarding the effect of the New Mexico Supreme Court decision in *Smith Machinery*, the Tenth Circuit observed (Pet. App. 9A), among other things, that it and other courts "have conditioned the invocation against a party of collateral estoppel and law of the case on that party's prior opportunity to have fully and fairly presented and argued its claims," citing, among other cases, *Kremer v. Chemical Construction Corp.*, 450 U.S. 461, 480-481 (1982). Due to Smith's dismissal of its state court claims, Hesston never presented or had the opportunity to present any of Hesston's evidence on the state antitrust claim in state court.

REASONS FOR DENYING THE WRIT

The decisions of the Tenth Circuit and District Court rest on various grounds consistent with the decisions of this Court regarding unlawful tying arrangements. The District Court held (Pet. App. 52A) that the alleged tying arrangement did not pass this Court's threshold test for application of the per se rule of illegality. The Tenth Circuit concluded that "Hesston's line requirement is not a per se violation of the Sherman Act." 878 F.2d at 1296. (Pet. App. 20A) The Tenth Circuit further observed that the arrangement in issue would, in any event, pass per se scrutiny. 878 F.2d at 1297. (Pet. App. 28A)

Examination of the question of antitrust law presented by Smith is unnecessary to the disposition of the case. Resolution of the Question Presented in the context of

[3] **The dismissal of the Clayton Act claim affirmed by the Tenth Circuit is not raised in the petition for certiorari and is not encompassed by the Questions Presented.**

this case would be of limited precedential value. Among other things, the arrangement that Smith challenges should not be viewed as a "tying arrangement" at all for purposes of antitrust law because the required expenditures for the alleged "tied product" were *de minimis* and the arrangement did not foreclose any choice among competing products. The facts in the record below do not permit any reasonable inference of actual or potential foreclosure of sales in the alleged tied product market.

Smith's contention as to the supposed precedential or other effect of the New Mexico Supreme Court decision (that remanded Smith's state antitrust claim for a trial in state court that never occcurred) is discussed in the opinions of the Tenth Circuit and the District Court. The decision below does not implicate the Full Faith and Credit Clause or raise any other important issue, contrary to the assumption in the Question Presented by Smith.

I. THE DECISIONS OF THE COURT OF APPEALS AND THE DISTRICT COURT ARE CONSISTENT WITH THE DECISIONS AND POLICIES OF THIS COURT REGARDING TYING ARRANGEMENTS.

Only "*certain* tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*.'" (Emphasis added.) *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 9 (1984). Smith's claim did not resemble the tying arrangements that have been held to "constitute an unacceptable risk of stifling competition." The tying arrangements that "pose an unacceptable risk of stifling competition" and "serve hardly any purpose beyond the suppression of competition" have certain fundamental characteristics described, for example, in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958) as follows: "They deny competitors free access to the market for the tied product, . . . [and] buyers are forced to forego their free choice between competing products."

Smith claimed that if Smith was forced to purchase any Hesston tractors, Smith would have to "forego" some number of John Deere tractors that Smith otherwise would have carried, and contended that, in itself, proves "foreclosure" of sales.

The facts in the record below, however, establish that Smith would not have had to "forego" the choice of a John Deere or any other tractor as a result of "buying" the Hesston tractor. The reason is that Smith did not have to make a significant out-of-pocket expenditure in order to "buy" the Hesston tractor and offer it for sale to consumers. Basically, Hesston tractors were offered for sale at Hesston's expense, not at dealer expense. Because of various financing programs offered by Hesston, no Hesston dealer was required to pay for a Hesston tractor prior to the sale of the tractor at retail (or circumstances equivalent to a sale such as refusing to transfer a tractor in inventory to a dealer who made an actual sale). The only required expenditures prior to a retail sale were for parts, tools, manuals, freight, a nominal finance service charge and round trip travel expense for one person to Wichita, Kansas for training in service and repair of Hesston tractors.

The out-of-pocket expense for Smith to carry Hesston tractors was, as the District Court observed, *de minimis*. "Given the dollar volume of Smith's business, just making the $4,000.00 outlay could not, as a matter of law, have excluded Smith from purchasing John Deere tractors." (Pet. App. 59A-60A.) The District Court correctly held that Smith failed to identify any competent evidence of additional cost despite Smith's conclusory assertions to the contrary. (Pet. App. 60A)

No controversial question of law is presented by the conclusion that an expenditure of three to four thousand dollars could not reasonably be held to foreclose Smith Machinery from purchasing any and every kind of non-Hesston tractor Smith Machinery desired. A business

enterprise such as Smith Machinery, with gross sales of several million dollars per year, could not, as a matter of law, predicate a claim of foreclosed purchases on a *de minimis* expenditure of a few thousand dollars. This is true even if the Tenth Circuit's reliance in part on the analysis in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), was improper or erroneous, as Smith maintains in its petition (p. 8).

In *Jefferson Parish*, 466 U.S. at 15-16, this Court observed that "application of the *per se* rule [in tying cases] focuses on the probability of anticompetitive consequences. . . . [*A*]*s a threshold matter there must be a substantial potential for impact on competition* in order to justify *per se* condemnation." (Emphasis added.) Similarly, this Court observed that:

> Of course, the Sherman Act does not prohibit "tying," it prohibits "contract[s] . . . in restraint of trade." Thus, in a sense the question whether this case involves "tying" is beside the point. *The legality of* [*the defendant's*] *conduct depends on its competitive consequences not whether it can be labeled "tying."* If the competitive consequences of this arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label.

Jefferson Parish, 466 U.S. at 22, n. 34 (emphasis added).

As a matter of law, Smith did not meet the threshold requirement for proof of an unlawful tying arrangement under either the per se rule or the rule of reason. Consistent with the precedent and policies of this Court, Smith's claim failed because of the absence of *any* evidence (or even arguable inference) of "competitive consequences" flowing from the arrangement, other than procompetitive consequences.

II. DUE TO THE PARTICULAR FACTS IN THE RECORD, RESOLUTION OF THE ANTITRUST QUESTION PRESENTED IS UNNECESSARY AND WOULD BE OF LIMITED PRECEDENTIAL VALUE.

A tying arrangement is an agreement to sell one product (the tying product) but only on the condition that the buyer also purchase a different (tied) product. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). The arrangement in issue here lacks the fundamental characteristics of "tied sales" implicit in the foregoing definition. Therefore, resolution of the broad antitrust Questions Presented is unnecessary in this case. Further, this case is an inordinately limited context in which to establish a broad rule about whether a tying arrangement between a dealer and a manufacturer is generally exempt from the *per se* rule against tying, as Smith asks this Court to do.

A. The Arrangement in Issue Is Not Properly Classified as a Tying Arrangement.

The tying arrangements held to pose an "unacceptable risk of stifling competition" are those that force buyers to "forego their free choice between competing products." *Northern Pacific*, 356 U.S. at 6. Smith, not Hesston, asked the courts below to stand tying law, logic and policy on its head. The record established that the arrangement did not require Smith to "purchase" any tied product, or to "forego" any purchase of any alternative products, in any senses of the terms meaningful to the antitrust laws. Absent a meaningful expenditure by Smith resulting from a "tied sale," the foreclosure of choice that is the focus of the law of tying is not inherent in the arrangement and, as a matter of law, was absent in this case.

B. The Record Does Not Permit Any Reasonable Inference of Actual or Potential Foreclosure of Choice Among Competing Products.

The record established that *no* amount of commerce (i.e., tractor sales) would have been foreclosed to Hesston's competitors in the tractor market, even if Smith had acceded to Hesston's request that Smith abide by its representative line requirements by stocking Hesston tractors. The Hesston dealership agreement with Smith was non-exclusive, and Smith was free to continue to stock and sell competitive tractors, particularly John Deere tractors. The *de minimis* expense to Smith of carrying the Hesston tractor simply could not reasonably be held to foreclose Smith from purchasing other tractors. From John Deere's point of view as a Hesston competitor, John Deere was free to continue to compete with Hesston through Smith or any other dealer. As for ultimate consumers, their choices would have been enhanced, not impeded, by the addition of Hesston tractors to existing available lines.

Moreover, the antitrust laws were enacted for the protection of *competition*, not *competitors*. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original). Even if purchases of Hesston tractors would have precluded Smith from buying as many John Deere tractors as before, *consumers* in the Pecos Valley would still not be foreclosed from choosing John Deere tractors under the alleged arrangement.[4] The record established the following facts: First, Smith would still have carried John Deere tractors. Second, Smith could have sold additional Deere tractors by ordering them for customers rather than by displaying them in inventory. (At times in the past, Smith could not get enough Deere tractors to

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[4] Consumers in the Pecos Valley necessarily went to dealers other than Smith for all kinds of tractors other than John Deere because Smith did not represent any tractor manufacturers other than John Deere.

sell from inventory anyway.) Third, John Deere, a company with many times the sales volume of Hesston, had the ability and did *in fact* place John Deere products, including tractors, in another dealership in the Pecos Valley which competed with Smith.

For the foregoing reasons, consumers would have had the choice of all existing tractor brands plus additional Hesston tractors in the Pecos Valley even if Smith had no longer been able to "buy" as many John Deere tractors as before. On the other hand, had Smith succeeded in its attempt to retain the Hesston dealership while refusing to carry Hesston tractors, Smith would have foreclosed consumers from choosing the Hesston tractor, and Hesston would have been frozen out of the Pecos Valley area because farm equipment dealers do not generally carry an isolated product out of a small manufacturer's line.

The only conduct limiting choice in the marketplace was the conduct of Smith, not Hesston. As a matter of law, the Hesston representative line requirement, to the extent viewed as a tying arrangement at all, carried no adverse competitive consequence or impact, foreclosed no sales to consumers by Hesston's competitors, and was not an unlawful restraint of trade.

Under the analyses used by the courts below, or any other method of analysis, Hesston posed no danger of acquiring market power in the tractor market, the alleged tie affected an insubstantial volume of commerce in that market, and Smith's case failed under any formulation of the law of tying.

This conclusion was buttressed by the fact that the volume of sales of the alleged tying products (the Hesston big baler, self-propelled windrowers and parts) were miniscule compared to the volume of sales of the tied product (tractors) under any possible definition of the relevant geographic markets. Power in the tying product markets (assuming it existed) could not possibly leverage Hesston into a position of market power in the tractor

market in North America, New Mexico, or the Pecos Valley.

The extensive market information in the record amply demonstrated to the District Court and the Tenth Circuit why (irrespective of the cost of the Hesston tractor) neither Smith, nor any other dealer, could be "forced" to forego tractor sales based on Hesston's "power" in windrowers, big balers or Hesston parts. To the extent market power existed in the Pecos Valley, it was held by Smith, not Hesston. Even if Hesston had been a "monopolist" in big balers and self-propelled windrowers, the conclusion was inescapable that "monopoly power" in those tying products would not be the degree or kind of market power that would enable Hesston to acquire power and "force" purchases in the tractor (tied product) market, a market more than *one thousand* times the size of "the big baler" product market and one hundred eighty times the size of the allegedly relevant windrower product market. There was no need to impanel a jury to pass on these facts; the District Court properly dismissed the case as a matter of law and the Tenth Circuit properly affirmed that decision.

III. THE EFFECT GIVEN BY THE COURT OF APPEALS TO PRIOR RELATED STATE COURT LITIGATION DOES NOT IMPLICATE ANY FULL FAITH AND CREDIT ISSUE AND WAS BASED ON WELL SETTLED LAW.

The Court of Appeals did not "fail to follow" any binding precedent. Consistent with *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), both the federal District Court below and the Tenth Circuit carefully examined the decision of the New Mexico Supreme Court in *Smith Machinery Corp. v. Hesston*, 102 N.M. 245, 694 P.2d 501 (1985) and applied well settled principles of law in evaluating the effect of the decision.

In *Smith Machinery*, the New Mexico Supreme Court reviewed the dismissal of Smith's case at the close of

Smith's evidence before presentation of evidence by Hesston. No court heard Hesston's evidence on any antitrust claim before such evidence was presented to the federal District Court below.

The basis for the state district court's decision dismissing Smith's state antitrust claim was that, in the opinion of the trial judge, full line forcing was an exception to the tying rules. The Supreme Court of New Mexico decided, based on Smith's evidence only, that Hesston's representative line requirement was not an exception to the per se standard in tying cases, and remanded the case for a full trial on the merits, emphasizing that its review of the relevant evidence was not to be construed as a commentary on the ultimate merits of the antitrust claim. *Smith Machinery*, 102 N.M. at 253, 694 P.2d at 509.

The doctrine of law of the case would not have applied to Hesston's motion for summary judgment even if the case had remained in state court. In New Mexico, holdings on appeal regarding the effect of evidence in the record are *not* conclusive after a remand for a new trial. *Bogle v. Potter*, 72 N.M. 99, 380 P.2d 839, 843 (1963) (New Mexico Supreme Court's prior statement as to effect of evidence not intended to be the law of the case for second trial).

The final disposition of the state court case was a stipulated dismissal without prejudice. In the state court proceeding, there was no full trial on the merits. Hesston's evidence on the state antitrust claim was never offered (except to the very limited extent it was possible to do so through cross-examination of witnesses called by Smith). No final judgment was ever entered, and the New Mexico Supreme Court opinion established no binding precedent with respect to the evidence in the record in federal court.

The record before the New Mexico Supreme Court did not (and could not) include, for example, Hesston's evidence regarding the extremely favorable financing arrangements that Hesston offered to dealers purchasing

Hesston tractors. The doctrine of law of the case is generally recognized as having no application when the subsequent evidence differs substantially from the prior record, and a manifestly unjust decision might otherwise result. *See, e.g., Moya v. Catholic Archdiocese of New Mexico*, 107 N.M. 245, 248, 755 P.2d 583, 586 (1988) and case cited therein. Moreover, in this case, the District Court and the Tenth Circuit were compelled by *State* law to apply federal case precedent. N.M. Stat. Ann. § 57-1-15 of the New Mexico Antitrust Act provides that:

> Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.

In light of the express command of this statute and dismissal of the federal claims, the District Court was correct in dismissing the state law claim.

The *Smith Machinery* opinion is not a "judgment" entitled to Full Faith and Credit—it is commentary on a limited and very different record than the record before the Tenth Circuit. The Tenth Circuit opinion raises no issue as to a conflict with state law that requires resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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